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SHALL WE HAVE "HOME RULE" FOR THE POLICE DEPARTMENTS OF OUR LARGE CITIES?

The disclosures in the Rosenthal case will no doubt tend to silence the cry for "home rule" in our large cities, at least so far as the police department is concerned.

New York City has "home rule." The city controls its own police department and the governor is powerless to interfere. But during this regime of "home rule," a "system" or "clique" has been organized to prey upon the morals of the greatest city in the world. The people themselves, as in every large city, are helpless. The governor, who alone is big enough to crush the conspiracy, is by law prevented from interfering.

The press of New York State is beginning now to urge the people to abolish home rule for New York City and to put the police department where it belongs, under the control of the chief executive of the state. Even the New York World now joins in this demand, saying: "The 'System' will remain until a corrupt city police department is legislated out of existence and a state police is established under the direct authority of the governor."

The demand for "home rule" is a false lure. Laws must be enforced by a power great enough to overcome all opposition and such power resides only in the supreme executive arm of the state.

"Home rule" deprives the laws of the state of their proper sanction,—that which alone makes them respected. The tendency indeed is, and should be, the other way. In many states, therefore, amendments have been proposed giving to the governor, through his attorney general, the power to remove criminal proceedings to other counties because of local prejudices, as, for instance, in the prosecution of lynchers, white cappers, etc.

To dignify the law, to enforce its sanction and, therefore, fully to protect the life, liberty and property of every citizen, it is necessary that the supreme executive power shall rest in the governor who holds in his hand that which no city administration can possibly have, to-wit: the scepter of absolute sovereignty, that supreme power of the state which resides in the people alone and which they have delegated to one central government with its three great departments, legislative, executive and judicial. As well might it be said that a municipal ordinance could override a general law, or that a local judge could overrule the supreme court as to say that a police department in any particular local jurisdiction should be free from the interference of the governor, the supreme executive of the state.

A. H. R.

NOTES OF IMPORTANT DECISIONS.

EXECUTORS AND ADMINISTRATORS—SETTING ASIDE FRAUDULENT CONVEYANCE AS MAKING LAND SUBJECT TO ADMINISTRATION.—The Eighth Circuit Court of Appeals held in an ejectment suit, that a title deraigned from a grantee in a conveyance by a decedent, which was set aside after his death in a suit by creditors, was superior to that derived from a purchaser under administrator's sale, the sale being made after the decree in said suit. Byrd v. Hall. 196 Fed. 762.

The lower court held the opposite—basing its ruling upon an opinion of Missouri Supreme Court in the suit above referred to. St. Francis Mill Co. v. Sugg, 169 Mo. 136, 69 S. W. 360. This opinion said: "There is no authority for the proposition that creditors might not assail a deed made to defraud them by their deceased debtor in his lifetime, and when the deed is set aside at their suit, that the administrator may not treat the property thus uncovered as assets of the estate."

But the Circuit Court of Appeals says there was no question involved in that case as to any jurisdiction of the probate court over this property and it construed Missouri statute as excluding such property. Its showing as to this, however, is not very satisfying.

It must be admitted that the setting aside of a fraudulent conveyance generally does noth-

ing more than subject the property to sale, and the conveyance remains valid between the parties. This is all that is desired by creditors of a living grantor. But the primary purpose of administration is to pay decedent's debts and the remainder goes to his heirs. Nevertheless, unless statute distinguishes it would seem that plaintiff creditors ought to make their indebtedness out of the property embraced in the conveyance. The decree appeared not to provide for this, and if the creditors were satisfied out of other assets of the estate there was no necessity for any sale by the administrator. This *dictum* of the Missouri court seemed loaded with dynamite for the purchaser at administration sale.

OUR NATIONAL JUDICIAL SYSTEM.

The Creation of the Supreme Court of the United States is due to a plan of government proposed several years before the framing of the Constitution by Pelatiah Webster. The original plan he doubtless derived from Aristotle, who, in the fourth book of his politics, observes that "in every polity there are three departments: First, the assembly of public affairs; second, the officers of the state, including their powers and mode of appointment; and third, the judging or judicial department."

Pelatiah Webster deserves more than passing notice. He was a graduate of Yale, a revolutionary patriot, and was not a lawyer, but a retired merchant. It is evident that he was a profound student of the science of government. It is recorded in the State Papers of James Madison[1] that in 1781 and in 1783 Mr. Webster had published pamphlets advocating the calling of a convention for the framing of a national constitution. When this convention met, Webster, then sixty years of age, republished and submitted his former papers, in which he elaborated his views in regard to an organic law. He proposed the creation of a Federal Government with three separate divisions: the Legislative, Executive and Judicial; the Executive to consist of the president, elected by Congress, and supported by a cabinet or council; the legislative, to consist of two bodies, similar to the English house of parliament; and the Judicial, to consist of a Supreme Court and such subordinate tribunals as law and equity might require. The language of the Constitution in regard to the judiciary is almost a word-perfect copy of Webster's suggestion, Section 1 of Article 3, providing that "the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish."

Credit is due Dr. Hannis Taylor, former Minister Plenipotentiary to Spain, and the author of "The Origin and Growth of the English and American Constitutions," and other works on jurisprudence, for rescuing Pelatiah Webster's name from the obscure tomes of our early history and according him the honor of first suggesting the creation of the United States Supreme Court. Not alone for his suggestion in regard to the Judiciary, but for his clear conception of the requirements of a constitution, which would form the foundations of free government and fix the limitations of its laws, is he entitled to a meed of praise equal to that accorded Madison, Hamilton and Pinckney, who elaborated his ideas in their plan submitted to the convention.

The convention succeeded, after being in session from May to September 24, 1787, in framing a Constitution which followed in the main the plan suggested by Webster, and was finally adopted by the thirteen states, not without much opposition and many misgivings. It remained then for the Congress to provide the legal machinery by which the several departments of the government could assume the exercise of the powers entrusted to them.

The Original Judiciary Act.—On the opening day of the first Congress Oliver Ellsworth of Connecticut introduced in the Senate a bill which became a law September 24, 1789, since known as the Judiciary

(1) Mad. Pap., pp. 791-800.

Act. Justice Field, in Ex Parte Virginia,[2] said in regard to it: "That great Act was penned by Oliver Ellsworth, a member of the convention which framed the Constitution and one of the early Chief Justices of this court. It may be said to reflect the views of the founders of the republic as to the proper relations between the Federal and State courts. It gives the Federal Courts the ultimate decision of Federal questions, without infringing upon the dignity and independence of the State courts. By it, harmony between them is secured, and the rights of both Federal and State governments maintained."

While the Supreme Court was authorized by the Constitution and exists by virtue of its express mandate, the provisions of that instrument upon which the efficiency of the court was to depend were few and simple, and it was necessary that the Judiciary Act fix the number of its judges, prescribe the jurisdiction, and create and invest with jurisdiction such inferior courts as were deemed necessary to discharge the duties of the judicial branch of the government.

Honorable Reuben O. Moon, in his review of the "Reorganization of Our Federal Judicial System," says, in regard to the Judiciary Act, that "it established a system of legal jurisprudence previously unknown to the world. It created the legal machinery for the first real constitutional court in history. It was the concrete administration of the political philosophy that made the judicial power one of the co-ordinate branches of the government of a free people. Being experimental, it was necessarily tentative in its character. There being no precedents for such a system, its weaknesses could only be disclosed by practical administration and its real value determined by its adaptability to the changing needs of a progressive nation." The act provided that the Supreme Court of the United States should consist of one Chief Justice and five Associate Justices;[3] it gave the court exclusive jurisdiction in all controversies of a civil nature where a State is a party, with exceptions named, and like jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or servants, consistent with the law of nations, and vested final appellate jurisdiction in the court in all cases.

The act further provided for a division of the entire United States, as then constituted, into judicial districts, the establishment of a District Court in each, the appointment of one judge for each court, who should reside in the district, and defined the civil and criminal jurisdiction of such courts. The districts thus formed were carved into three circuits, in each of which circuit courts were to be held, to be designated as the Middle, Eastern and Southern. The jurisdiction of the circuit courts thus created, including the right of appeals from district courts, was defined and it was provided that they should be presided over by two supreme court justices and one district judge. This judicial authority continued until 1869, when Congress created the offices of circuit judges.

Appointment of First Justices.—When the Judiciary Act became a law, President Washington at once appointed John Jay, of New York, Chief Justice of the Supreme Court, and John Rutledge, of South Carolina; James Wilson, of Pennsylvania; William Cushing, of Massachusetts; John Blair, of Virginia, and Robert H. Harrison, of Maryland, Associate Justices; Harrison declining to accept, James Iredell, of North Carolina, was, in 1790, appointed in his stead. So little importance was attached to the court, and so indifferent were the leading lawyers of the day to its possibilities and powers, that few aspired to posi-

(2) 100 U. S. 313.

(3) Congress has several times changed the number of the justices, the dates of the acts and the changes being as follows: February 13, 1801, reduced to five; March 3, 1802, increased to six; February 24, 1807, increased to seven; March 3, 1837, increased to nine; March 3, 1863, increased to ten; July 23, 1866, reduced to seven; April 10, 1869, increased to nine, as now constituted.

tions on its bench; this is evident from the fact that President Washington, during his administration, appointed three Chief Justices, two of whom tendered their resignations to accept positions more congenial to their tastes.

Organization of the Supreme Court.—The first meeting of the supreme court was at the city of New York, then the seat of the federal government, on the first Monday in February, 1790. The only business transacted was the reading of the commissions of the justices and their qualifying according to law; the appointing of a clerk; prescribing the devices for the seals of the supreme court and the circuit courts; prescribing the conditions on which attorneys and counsellors shall be admitted to practice in the court; prescribing the oath to be taken by attorneys upon admission; and providing that all writs should run in the name of the President of the United States. The court then adjourned, because, says Hampton L. Carson, in his History of the Supreme Court: "Not a single litigant appeared at the bar; the silence was unbroken by the voice of counsel, the tables were unburdened with the weight of learned briefs; no papers were on file with the clerk, and not a decision existed even in embryo. The judges were there, but of business there was none. No spectator of that hour, though gifted with the eagle eye of prophecy, could have foreseen that out of that modest assemblage of gentlemen, unheard of and unthought of among the tribunals of the earth, without a docket, a record or a writ, of unknown and untried powers and undetermined jurisdiction, there would be developed, within less than a century, a court of which the ancient world could present no model and the modern boast no parallel; a court whose decisions, woven like threads of gold into the fabric of our jurisprudence, would bind in bonds of love, liberty and law, the members of our great republic. Nor could it be foreseen that Congress would, in time, be flooded with petitions from every part of the country, asking that means be devised for the relief of an over-burdened tribunal."

Consider for a moment the responsibility which the court assumed upon its organization, and how much the perpetuity of our liberties is due to the justice and wisdom of its decisions; it was a tribunal without an example, and upon it devolved the duty of developing and interpreting a constitution which had no precedent and was itself an experiment and a compromise, "extorted," as John Quincy Adams said, "from the grinding necessities of a reluctant people." The thirteen independent sovereignties were unwilling to surrender even to a government they had created, and which it was provided they should control, their several, separate and conflicting powers, which threatened their destruction in mutual strife.

Early Influence of Circuit Courts.—To conform to the requirements of the Judiciary Act, two supreme court justices were assigned to each circuit,[4] and the then arduous and important duties of the circuit courts began. They were arduous aside from the judicial labor required, because of the difficulties and hardships of travel in those days. The places where courts were to be held were separated by long distances. The ready means of modern travel were unknown and the highways were little more than trails through the wilderness. They were important, aside from the matters adjudicated, in affording the judges opportunities for inculcating a spirit of national patriotism which did not then exist. The masses of the people had not, as fancy has led many authors to state, been happy participants in the creation and adoption of the Constitution, which was to form the welding bond of the new govern-

(4) For an interesting discussion of the constitutional right of a supreme court justice to sit in a circuit court, see argument of counsel in Stuart v. Laird, 1 Cranch 299, 2 Law. Ed. 115.

ment; they had assented to it reluctantly with a partial realization of its necessity, but they resented, if they did not fear, the exercise of its power. The demeanor, therefore, of the judges, who held the circuit courts, and the wisdom and moderation with which they conducted the proceedings of same, would have a potent influence in educating the people to more fully recognize the necessity and respect the power of the national government. Whether wittingly or not this difficult and delicate task seems to have been, with the aid of the district courts, effectively accomplished. The people, knowing in advance the day of meeting, traveled great distances to witness the openings of the courts. Each hostelry at the court houses became a Tabard Inn, populated for the time with pilgrims, not on the way to the shrine of a dead saint, but to a living altar of liberty and law, before which, in spirit, they bowed in respect and reverence and left it imbued with a patriotism no other power could inculcate. These were indeed the palmy days of our federal circuit courts; and while the meetings, to the superficial observer, partook much of the nature of holidays, their influence in creating a respect for law, the foundation of good citizenship, and in promoting a love of country, the flower and fruit of such citizenship, should not be lightly estimated. To-day, other influences may, and no doubt do, aid the people in realizing their duties and appreciating their responsibilities; for "the busy atmosphere, the crowded calendars and the rapid machine-like performance of the functions of our courts" offer little attraction to the average citizen, but to the student who seeks in the history of the past for the causes of present conditions, it is no little source of regret that the courts have lost their attraction to the masses of the people, even if their influence has not been lessened.

Lack of Influence, at First of Supreme Court.—While the circuit and district courts were acquainting the people with the new system of government, reconciling them to its jurisdiction and impressing them with its power, the supreme court as a court—although its justices sat in the circuits—had done nothing to give it prestige and entitle it to the respect of the people. For twelve years after its organization no opportunity arose for the determination of a question of national importance in the interpretation of the Constitution or the approval or condemnation of a statute, federal or state. One exception may be noted in the case of Chisholm v. Georgia,[5] decided in 1793, which elaborately discussed and determined the right of a citizen of one state to sue another state. The authority of this case was, however, abrogated by the adoption of the eleventh amendment to the Constitution in 1798. So little was the power, and as a consequence, the importance of the court appreciated that even John Jay, who, upon being reappointed and confirmed chief justice in 1801, hesitatingly and despairingly wrote to President Adams, declining the honor.

Marshall's Appointment and its Effect.—Jay's determined purpose to retire to private life based, as he declared, on his timorous doubt as to the power of the court, led to the appointment of John Marshall as Chief Justice, January 31, 1801. In his appointment the adage that "there is a divinity that shapes our ends, rough hew them how we may," receives ample confirmation. The time was opportune for the advent of a great jurist, whose comprehensive learning, keen analysis, unbiased judgment and clear foresight would enable him to sweep the horizon of the court's power and press each principle to its logical conclusion. The court's calendars were burdened with cases involving many questions growing out of the wars in which the country had been engaged, or with which it was threatened. No precedents existed defining our rights and powers as a nation; the limits of maritime jurisdiction, the powers of courts of admiralty, the

(5) 2 Dall. 417, 1 Law. Ed 440.

force and effect of treaties, and the extent of the powers of the federal and state governments under the constitution, had not, except in an academic way, been determined. In addition, the court was constantly being required to settle questions involving the rights of individual citizens.

The ability, learning and dignity displayed by the court from the advent of Marshall as Chief Justice, is unparalleled in the annals of jurisprudence. It is no disparagement to his associates or subsequent members of the court, to say that its dignity and importance, commanding today the respect of the civilized world, is due more to John Marshall than all others. From the delivery of his opinion in Marbury v. Madison, in 1803,[6] holding for the first time that the supreme court had power to declare null and void an act of Congress, in violation of the Constitution, down to his last judicial utterance,[7] in 1835, in Insurance Company v. Adams,[8] holding that the supervisory power of the supreme court will not be exercised while a cause is pending in the lower court, he continued, during the thirty-four years of his judicial tenure, to add to the prestige and more clearly define the power of the court as one of the co-ordinate branches of the government.

Other Influences Adding to Prestige of Supreme Court.—In addition to the bold and convincing interpretation of the Constitution by Marshall, many other causes have conspired to more clearly define the powers and add to the prestige of the supreme court. The settlement, organization and admission of new states, their rapid increase in population; the expanse of territory caused by the Louisiana Purchase; the acquiring of Florida, and the vast area west of the Rocky Mountains; the admission of Texas; our wars, civil and with foreign nations; the invention of the steam engine, making commerce world-wide and the people of earth's remotest bounds our neighbors; the harnessing of the electric current, and the wonderful inventions and discoveries in the industrial arts, have necessitated much congressional legislation, requiring judicial construction, and have given rise to many important questions for the court's ultimate determination, unheard of and impossible under more primitive conditions. Of necessity, therefore, the power of the court has been extended to meet the magnified condition of the country's business and solve the many complex and important questions of our modern life.

Limitations on Court's Powers.—The court has steadily disclaimed any power to determine question of a political nature, or those requiring the exercise of legislative or executive discretion, or of the powers reserved to the states. This limitation of its powers to matters purely judicial has precluded the court from determining questions arising under treaties with foreign powers and with the Indian tribes, the court holding in such cases that it was concluded by the acts of the executive and legislative branches of the government. In 1792 it declined to execute an act of Congress which had assigned certain duties not of a judicial nature to the circuit courts in regard to pensions.[9] In 1819, in McCulloch v. Maryland,[10] and in 1883, in Juilliard v. Greenman,[11] the power of Congress, in the first case, to create a United States bank, and in the second, to make United States treasury notes a legal tender, was held to be authorized. The court, however, declared in each of these cases that the expediency of the exercise of these powers was a political question upon which it could not pass. In 1848, in Luther v. Borden,[12] the court held itself bound by the president's decision as to which one of two rival organizations in Rhode Island,

(6) 1 Cranch 137.

(7) Plato, in his Ideal Republic places the limit of judicial service at 70 years. Marshall was 80 when he wrote this opinion.

(8) 9 Pet. 573.

(9) An interesting note to Hayburns case, 2 Dall. 410, 1 Law. Ed. 436, gives in full the reasons of the justices for their declination.

(10) 3 Wheat. 316, 4 Law. Ed. 579.

(11) 110 U. S. 421, 28 Law. Ed. 204.

represented the lawful state government. In 1868, in Georgia v. Stanton,[13] the right of a state to an injunction to prevent the Secretary of War (Edwin M. Stanton), from enforcing the so-called reconstruction acts, passed by Congress in 1867, was denied on the ground that the granting of the writ involved the adjudication of rights of a purely political character. The rule of non-interference was pressed to its ultimate limit in this case; buttressed as is the opinion by precedent, it has been severely criticised, not on political grounds alone, as was the opinion in the Dred Scott case,[14] the reasoning of which has never been answered, but on professional and legal grounds as well. The arguments of Hon. Jere S. Black and Chas. O'Conor, who represented the State of Georgia in the application for the writ, analyzed in conjunction with the court's reasoning, may enable it to be determined whether the old maxim, *qui haeret in litera, haeret in cortice*, said by Lord Bacon to be rude and ungrammatical, but nevertheless expressive, is applicable to the opinion.

The court has uniformly upheld the police power of the states, as is evidenced by the License Tax case,[15] the Slaughter House cases,[16] the Lottery case,[17] the Oleomargarine case[18] and the Prohibitory Liquor Law cases.[19]

Numerous cases illustrate the court's affirmative exercise of its powers in the interpretation of the Constitution.

In Gibbons v. Ogden,[20] the court first expounded the "commerce clause" of the Constitution and upon this case rests the decision of the Pensacola Telegraph case,[21] and many subsequent cases determining questions presented by the marvelous commercial development of the country.

The limits of this paper will not permit reference to, much less a discussion of, the court's numerous other opinions, which, from Marbury v. Madison,[22] to the Northern Securities[23] and Standard Oil (October Term, 1910, U. S. Sup. Ct.) cases, have laid the foundation and erected thereon a system of jurisprudence which challenges the admiration of the world.

DeTocqueville, in speaking of our Supreme Court, said: "A more imposing judicial power was never constituted by any people; it is by nature of its rights and the class of justiciable parties it controls, at the head of all known tribunals."

Sir Henry Maine says: "The Supreme Court of the United States is not only an interesting, but virtually a unique creation of the founders of the Constitution. The success of this experiment has blinded men to its novelty. There is no exact precedent for it either in the ancient or modern world."

Withdrawal of Supreme Court Justices From Circuits.—With the growth of the supreme court docket its judges were gradually withdrawn from the circuits. In 1792 the necessity for the sitting of two supreme court justices in each of the circuits was modified, and in 1793, their attendance was limited to one justice. Appeals from the district courts becoming more numerous with the general increase in litigation, the gradual withdrawal of the supreme court justices from the circuit courts devolved more and more work on the district judges; thus burdened and overwhelmed with work, relief was finally sought in legislation, resulting in the Act of April 10, 1869, which was, in effect, a reorganization of our national judicial system. This statute created a circuit judge in each of the nine circuits, and provided that thereafter each circuit court should

(12) 7 How. 1, 12 Law. Ed. 58.
(13) 6 Wall. 50, 18 Law. Ed. 721.
(14) Dred Scott v. Sandford, 19 How. 393; 15 Law. Ed. 691.
(15) 5 Wall. 462, 18 Law. Ed. 497, 675.
(16) 16 Wall. 36, 21 Law. Ed. 394.
(17) 101 U. S. 814, 25 Law. Ed. 1079.
(18) 127 U. S. 678, 32 Law. Ed. 253.
(19) 18 Wall. 129, 21 Law. Ed. 929; 97 U. S. 25, 24 Law. Ed. 989; 123 U. S. 623, 31 Law. Ed. 205; 128 U. S. 1, 32 Law. Ed. 346.
(20) 9 Wheat. 1, 6 Law. Ed. 23.
(21) 96 U. S. 1, 24 Law. Ed. 708.
(22) 1 Cranch 137.
(23) 193 U. S. 197, 48 Law. Ed. 679.

be held by a justice of the supreme court, or a circuit judge, or a district judge, sitting alone, a visit to the circuit court being required of the supreme court justice but once in two years. While the dignity of the circuit court was lowered by the loss of the supreme court justice, its practical usefulness was promoted by the creation of the circuit judge, but its ultimate abolition was indicated by the provision which authorized the performance of all of its functions by a district judge.

The inauguration of this system resulted in the practical withdrawal of the supreme court justices from the circuits, enabling them to devote their time, then wholly occupied, to the consideration and determination of important questions involving their constitutional powers as a court of last resort. To such an extent had the business of the district courts grown that cases appealed therefrom occupied the greater part of the time of the circuit courts, added to this, the latter were required to exercise a large original jurisdiction. The circuit courts extended over vast areas of country and having but one judge, necessity frequently required that the court be held by the district judge alone; the district courts also clothed with original jurisdiction under the Act of 1789, which had been materially increased by many subsequent enactments, soon found, with the additional duty of their judges holding the circuit courts, their calendars crowded with cases. Aside from the defects in the system, under which the courts operated, this overcrowded condition of the docket was due to the constantly increasing volume of legal business. Such was the magnitude of this increase that not only the district and circuit courts, but the supreme court as well, were unable to keep pace with business of the country. Justice was delayed, and many questions involving new principles of law arose, the determination of which was necessary to the growth and prosperity of the country. For more than twenty years, or from 1869 to 1890, this condition continued, the business of the courts becoming more and more congested from year to year. The people finally awoke to the situation and Congress was flooded with petitions for relief.

The Circuit Courts of Appeals.—In 1890, a bill was introduced in the House of Representatives, entitled, "An Act to define and regulate the jurisdiction of the United States Courts." It provided for the creation, in each judicial circuit, of a court to be known as the "Circuit Court of Appeals," to consist of three judges and to have appellate jurisdiction alone, the circuit courts being thereby shorn of their appellate powers. It further took from the supreme court, appellate jurisdiction in a large class of cases and created eighteen circuit judges, in addition to the nine authorized by the Act of 1869, to fill the positions in the new courts. The day before the adjournment of Congress, on March 3, 1891, the bill became a law. The dignity and importance of the tribunals thus created were soon recognized and their practical necessity at once made apparent. Exercising final appellate jurisdiction in a wide range of subjects, they have afforded pronounced relief to the supreme court and have facilitated the disposition of business in the circuit and district courts. It has been demonstrated, however, that the continuance of the original jurisdiction of the circuit courts under the Act of 1891 was a mistake; it was contended by the House members of the judiciary committee, that this jurisdiction should be abolished, but the Senate members of the committee were intractable, and the bill, as it became a law, was a concession and a compromise. With the exception noted, the operation of the statute, during the twenty years of its existence, has been effective and satisfactory. Many important cases have been determined by the courts of appeals affecting the interests of the people in every section and these opinions have been received with respect and confidence, second only to that accorded to the opinions of the United States Supreme Court.

Opinions Subjected to Criticism.—That the opinions of our courts, not excepting the supreme court, have frequently been subjected to the severest criticism, I admit, but it is well that it is so. Owing to the spirit of our institutions and the individual independence of our people there is no lese majeste in this country; no sacred aureole of inerrancy, such as was believed by a simpler people to encompass the ecclesiastic and the king, surrounds our courts, rendering their rulings immune from criticism; and, while the freedom of speech and the press is sometimes harshly and unfairly exercised, especially in regard to the courts, out of it all comes ultimate good; if censure be unfair and not well founded it will fall of its own weight and the principle or ruling assailed will receive an emphasis it could not have acquired without criticism. I believe it is Rochefoucauld, who says, "it is from our enemies, never from our friends, that we must learn wisdom," and while the critic need not be an enemy to the courts, his criticisms often disclose errors, otherwise overlooked, enabling them to be thereafter avoided. Jurisprudence, and, in fact, every other branch of learning, owes more of its progress to the analyst and the doubter than its unquestioning votaries will ever kindly admit.

The District Courts.—Of the courts of general jurisdiction there remains for consideration the district courts. As a consequence of the necessary inter-relation of our different national courts with each other, much incidental reference has already been made to the district courts. Until the adoption of the Act of 1869, when the circuit courts were shorn of all of their appellate powers, the district courts were the only federal tribunals whose jurisdiction was wholly original. These courts were given a wide range of jurisdiction, civil and criminal, in some cases exclusive and in others concurrent with the circuit courts. In addition to the thirteen original districts created by the Act of 1789, others have, with the increase of population and business and the formation of new states, been created, making the present number seventy-seven, many of which are subdivided, requiring the courts to be held in two hundred and seventy-six different places.

Since the creation of the Court of Appeals the time of the circuit judges has been entirely occupied in those courts, and they have thus been prevented from sitting in the trial of cases. This has resulted in materially increasing the labors of the district judges. In addition, it is provided in the Courts of Appeals Act, that one or more district judges within the circuit shall be competent to sit in such courts. In several of the circuits the crowded condition of the dockets has made it necessary that district judges be called in to assist in the disposition of the business. This is notably true in the 8th circuit, in which the court of appeals has frequently called to its aid the judge (Hon. John F. Philips, who has since retired), of the Western District of Missouri. The wisdom of this selection is manifest to everyone familiar with our judicial literature, for the opinions of this judge adorn and enrich our federal reports and will ever stand as an imperishable monument to his ability, labor and learning.

Other Federal Courts.—In addition to the federal courts of general jurisdiction there are three other United States courts of limited powers created for special purposes, and deriving their functions wholly from the acts creating them; they are the court of claims, the court of customs appeals, and the commerce court.

The Court of Claims.—The court of claims, established by the Act of February 25, 1855, was to consist of three judges. Under the act of its creation the court was empowered to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, and all claims which may

be referred to it by either House of Congress." In 1863, the court's jurisdiction was extended and the number of judges increased to five, as now constituted. Subsequently from 1866 to 1910, further extensions of jurisdiction have been conferred on this court. Its reports abound in decisions involving many intricate questions of international law, interesting to the student of history, and of practical importance to the jurist seeking light in this difficult branch of the law.

The Court of Customs Appeals.—The court of customs appeals was created in the Tariff Act of August 5, 1909. It is made the court of last resort in all controversies arising from the classification of imported goods. It consists of five judges. The court has only been in operation about a year and a half and one volume of the reports of its decisions has been issued.

The Commerce Court.—The commerce court was created June 18, 1910, by an amendment to the interstate commerce act. It has jurisdiction to enforce the orders of the Interstate Commerce Commission, to hear cases brought to enjoin or set aside orders of the commission, other than for the payment of money; to hear cases of rebating under the Elkins Act and mandamus proceedings under sections 20 and 23 of the interstate commerce law. The appointment by the president of five additional circuit judges to constitute this court was authorized by the act of its creation. The appointments have been made and the court has been organized. The wisdom of the creation of this court has been questioned. Aside from the aid its judges may afford the courts of appeals, it is claimed that its powers could well have been conferred on the interstate commerce commission and the expense and complexity to the judicial system of an additional tribunal thereby avoided.

The New Judiciary Act.—Notwithstanding the relief afforded by legislation restricting the appellate powers of the supreme court, creating with wide appellate jurisdiction the courts of appeals, and from time to time adding to the number of the district courts, it has been demonstrated in the twenty years that have elapsed since the last great change was made in our judicial system in 1891, that the courts cannot, as now constituted, keep pace with the rapidly rising tide of legal business.

Efforts have frequently been made during the last ten years to enact a law which would simplify and render more effective the powers and functions of our federal courts. This has finally culminated, after much discussion and investigation, in the enactment by Congress, on March 3, 1911, of an act which, under one of its sections, is to be designated and cited as the "Judicial Code." It took effect and became in force on and after January 1, 1912.

It consists of 301 sections; under its provisions the circuit courts are abolished (Sec. 289) and their jurisdiction is conferred on the district courts; it re-enacts the statutes in relation to the supreme court (Secs. 215-255), the circuit courts of appeal (Secs. 116-135), and the court of claims (Secs. 136-187), and embraces the acts establishing the commerce court (Secs. 200-214), and the court of customs appeals (Secs. 188-199), and defines their respective jurisdictions. In the abolition of the circuit courts their present expensive and cumbersome machinery and their commingled and oftentimes perplexing jurisdiction with the district courts are eliminated, and there is substituted in their stead one court clothed with ample powers to dispense justice in any case that may arise for determination. The general practice of the courts under this new act remains the same as before, but it simplifies the procedure by requiring all cases of first instance to be brought and filed in the district courts. To meet the objection made when the bill providing for the code was pending, that if enacted it would not authorize a district judge in insolvency and other causes, to grant relief which would be operative throughout an entire circuit, a provision was inserted (Sec. 56), that where a receiver was appointed for land

or other property of a fixed character, lying within different states of the same judicial circuit, the receiver shall, upon qualifying, be vested with control over the property, subject to the disapproval of his appointment by the circuit court of appeals or a circuit judge within thirty days thereafter.

The flexibility of the act is illustrated by the provision that a circuit judge may, if the public interests demand it, hold a district court,[24] and he may, in the absence or inability to act, of the district judge, grant injunctions or restraining orders[25] in any case in which like authority could have been exercised by the district judge. Hereafter cases removed from state to federal courts will go to the district courts, with this limitation,[26] that no case arising under the act relating to the liability of common carriers by railroad to their employees in certain cases, and brought in any state court of competent jurisdiction, shall be removed.

The granting of interlocutory injunctions in cases involving the constitutionality of a state statute[27] which has heretofore subjected the federal judiciary to no little criticism, is in the new code hedged about with provisions intended to prevent the abuse of this power. The concurrence of three judges at least one of which shall be a justice of the supreme court or a circuit judge, the other two being either circuit or district judges, is necessary to the granting of the writ, the right of appeal from their order lying direct to the Supreme Court of the United States.[28]

The right of appeal generally to the circuit courts of appeals from interlocutory orders in injunction cases is extended to orders granting, continuing, refusing or dissolving or refusing to dissolve an injunction, or appoint a receiver;[29] this is in addition to the right of appeal under the present statute to grant or continue an injunction or appoint a receiver, and is a substantial re-enactment of the Act of February 18, 1895.[30]

The limitation as to the amount in controversy necessary to give a United States District Court jurisdiction, where the amount is requisite, is that it shall exceed three thousand dollars instead of two thousand, as heretofore required.

The status of the federal courts under the new code are now as follows:

One supreme court as now constituted; nine courts of appeals as now constituted; seventy-nine district courts required to be held in two hundred and eighty different places, and the three courts of special powers.

The abolition of the circuit courts and the conferring of their jurisdiction upon the district courts afford ample justification for the enactment of the new code, but it has other merits entitling it to commendation. Its clear and succinct provisions removing the incongruities and surplusage of former statutes evoke admiration, enhance its practical utility, and will cause it, as Mr. Hopkins says, in his work on the Code, to be regarded as a masterpiece of brevity and condensation, and, considering the wide range of its subject-matter and the great number of courts affected, the most compact code of nisi prius and appellate jurisdiction and procedure in all history.

Much credit is due personally to Hon. Reuben O. Moon, of the Philadelphia Bar, and a member of the House of Representatives, for the enactment by Congress of this Code; as chairman of the Special Joint Committee on the Revision of the Laws, he assisted materially in framing it, reported it to the House, and labored sedulously and persistently until he secured its passage. It is related that the president, who with his predilection for jurisprudence rather than statecraft, had made

(24) Sec. 18.
(25) Sec. 264.
(26) Sec. 28.
(27) See Ex Parte Young, 209 U. S. 123; 52 Law. Ed. 714.
(28) Sec. 266.
(29) Sec. 129.
(30) 1 Comp. U. S. Stat., p. 550.

a careful study of the bill, said when he signed it "Moon, this is your monument;" and a grand monument it is, more enduring than brass or marble, which will perpetuate his name with that of Ellsworth, to all posterity. ROBT. F. WALKER.

St. Louis, Mo.

MASTER AND SERVANT—SAFEGUARDING MACHINERY.

GELDER v. INTERNATIONAL ORE TREATING CO.

Supreme Court, Appellate Division, First Department. April 4, 1912.

134 N. Y. Supp. 783.

Under Labor Law, requiring machinery to be properly guarded, the duty to guard only arises when there is a reasonable anticipation of danger.

DOWLING, J.: Plaintiff was in defendant's employ on June 13, 1907, operating a machine known as a "jointer," some 7 feet long and 14 inches wide, set at an elevation above the floor of one of the rooms in the defendant's place of business. This machine contained knives projecting an eighth of an inch above the level of the table, and revolving, when in operation, towards the workman. There was an iron gauge, 6 inches high, against which was pressed the wood sought to be cut, which usually comes in pieces 2 feet long and 2 inches wide. While the knives were revolving, the workman used his right hand to press the wood towards them, and with his left thumb pressed down upon the wood to keep it steady. While so engaged, the wood suddenly 'jumped back" as plaintiff describes it for some reason which no one undertakes to explain, and his left hand fell in front of the knives, which cut off the thumb and a portion of the hand. The action is brought under the Employer's Liability Law, and negligence is predicated upon the defendant's failure to guard the machine as required by section 81 of the Labor Law, which, so far as it is applicable, reads as follows:

"All vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery, of every description shall be properly guarded.'"

Evidence was introduced tending to show that similar machines used by other employers were provided with a guard, which was set over the knives in such a way that the hand of a workman could not possibly come into contact with them, and that such guard came as part of the original equipment of the machine. There was also proof that plaintiff had called the attention of the defendant's general manager to the absence of a guard when the machine in question was put up some eight months before, and the manager said he would make one for use thereon. Plaintiff some weeks later again called attention to the absence of the guard, and said he was afraid to work on it, but the general manager said he would make one when he had time and not to mind it but go ahead.

(1) Objection was made to the receipt in evidence of the notice given under the Employer's Liability Act, but the defendant was clearly advised thereby that the plaintiff's claim was based upon a defect in the condition of the jointer by reason of its not being provided with a guard, and a machine not guarded as required by the Labor Law is a defective machine. Proctor v. Rockville Centre Milling Co., 141 App. Div. 900, 126 N. Y. Supp. 743.

(2, 3) Exception was taken to the charge of the learned trial judge that "if you find that it was practical for a guard to be placed upon the machine, and if the master omitted to place a guard there that would be negligence," as well as to the refusal to charge, at defendant's request, that:

"If the master, in the exercise of reasonable care, could not have foreseen the accident would have occurred in the manner described by the plaintiff, then there was no duty on his part to guard the machine."

To this the court replied:

"No, gentlemen, I refuse to charge that. The statute casts a duty upon him. It is not for him to decide."

(4) So far as the question of the assumption of risk by plaintiff was concerned, that was a question of fact for the jury, and it was properly submitted to them. Klein v. Garvey, 94 App. Div. 183, 87 N. Y. Supp. 998; Neuweiler v. Central Brewing Co., 119 App. Div. 101, 103 N. Y. Supp. 1136; Graves v. Stickley Company, 125 App. Div. 132, 109 N. Y. Supp. 256, affirmed 195 N. Y. 584, 89 N. E. 1101.

The sole question here presented is, Do the two exceptions just quoted present reversible errors for our consideration? In Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811, which was a case where a boy 13 years and 3 months old had been employed in a factory in direct contravention of the provisions of section 70 of the Labor Law (Consol. Laws, c. 31), prohibiting the employment in any factory of a child under the age of 14 years, four judges agreed that a ques-

tion of fact was presented for the determination of the jury, and that in case it should be found that the defendant was negligent and the plaintiff, under the circumstances, was not chargeable with contributory negligence, the defendant was civilly liable. The Chief Judge concurred in an opinion wherein he held that the violation of the section, although punishable as a misdemeanor, also, in the case of injuries which could not have happened but for its violation, constituted evidence of negligence to be considered by the jury. The two dissenting judges held that the section created no cause of action whatever. In that case the prior decisions were reviewed to demonstrate that a statute prohibiting the doing of an act which is dangerous to the life or health of others might also furnish a jury with the basis of a finding of negligence and a liability for damages resulting from the doing of the prohibited act. But we are referred to no case holding that the failure to perform an act required by the Labor Law constitutes negligence per se, so as to leave no question on that phase of the case for the jury. All the cases hold, by analogy with those where a violation of a municipal ordinance was involved, that the violation of a duty imposed by statute or ordinance, where no right of action is in terms created, is some evidence of negligence, and raises at most a question of fact for the jury, but is not necessarily negligent. Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488; McGrath v. R. R. Co., 63 N. Y. 522; McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153; Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811; Kiernan v. Eidlitz, 109 App. Div. 726, 96 N. Y. Supp. 387. In the case at bar the machinery was not entirely unguarded; only an eighth of an inch of the knives projected above the table, the rest being guarded by the table itself. The duty to guard imposed by the statute depended upon two considerations: First. Was it practicable to guard? Second. Could danger reasonably have been anticipated to the workman? As the rule is laid down in Scott v. International Paper Co., 204 N. Y. 49, 97 N. E. 413:

"Where it is practicable to guard a machine, and danger from its remaining unguarded should be reasonably anticipated, the provisions of the statute quoted (section 81 Labor Law) are mandatory."

In the case at bar as to the first essential element to make the statute applicable there was evidence of the practicability of placing a guard on this machine. This evidence was not controverted. When the court charged the jury, therefore, that if "it was practical for a guard to be placed on a machine, and the master omitted to place a guard there, that would be negligence," that was practically a direction of a verdict against plaintiff, and nothing remained save to assess the damages.

The learned court failed to charge the necessity for the existence of the second element, viz., a reasonable anticipation of danger. As was said in Valentino v. Garvin Machine Co., 139 App. Div. 139, 123 N. Y. Supp. 959:

"A master is not bound under all circumstances to guard all of the machines in his factory. Some force must be given to the word 'properly,' and the necessity of guarding must to some extent be determined by the probable dangers from exposure (Glens Falls P. C. Co. v. Travelers' Insurance Co., 162 N. Y. 399, 56 N. E. 897; Dillon v. National Coal Tar Co., 181 N. Y. 215, 73 N. E. 978."

Applying the rule uniformly laid down in all these cases, it follows that the employer is bound to guard machinery under the requirements of section 81 of the Labor Law if it is practicable so to do, and if danger can reasonably be anticipated from its remainng unguarded. When the duty to guard exists, the failure to guard furnishes evidence of negligence which must be submitted to the jury with the other evidence in the case, but does not as a matter of law constitute negligence per se.

The judgment and order appealed from must therefore be reversed, and a new trial ordered, with costs to appellant to abide the event.

Ingraham, P. J., and McLaughlin, J., concur.

Miller and Laughlin dissent.

NOTE.—*Guarding Machinery as Affecting the Question of Assumption of Risk.*—The principal case shows that New York decision carries into its safeguarding statute what is ordinarily expressed in such legislation, viz.: that machinery is to be guarded when it is so located as to be dangerous to employees in their accustomed work. The effect of such legislation ought to be in all courts, independently of whether they regard failure to comply with the statute as negligence *per se* or merely evidence of negligence, that a working place may be presumed by an employee to have its machinery properly guarded, in all places where it otherwise may be dangerous to employees and an employee may recover for injury, unless unguarded machinery stood out before his eyes like a wall in imminent danger of falling or a tool whose defect was apparent to the least attention.

Two of the five judges sitting in the principal case dissent on the ground that "the machine was presumptively maintained contrary to the statute and (they were) unable to discover any evidence in the record to rebut that presumption. * * * We have the case then of a mandatory duty imposed for the benefit of plaintiff, which the defendant violated to the plaintiff's injury."

This view by the minority excuses the employee from being responsible in the way of assumption of risk of what might be an obvious danger.

Its last analysis is that open, unguarded machinery, where there is a mandatory duty to guard, is not an assumption of risk, and not one of the ordinary risks of employment which would exist but for the statute. Why is this not a fair way to look at the matter? It is lawful to work in such a place in the absence of such a statute and the statute means that, if former ordinary risks are not guarded against, they shall, at all events, be considered to be, so far as the relation of master and servant is concerned.

In 72 Cent. L. J. 95, we considered the case of West v. Bayfield Mill Co., 144 Wis. 106, 128 N. W. 992, where there was also a dissenting opinion concurred in by three of the seven members of the court. As in New York, there are a number of cases on the safeguarding statute, and in a very elaborate opinion the dissenting judges contend that the case was decided as if the safeguarding statute was non-existent.

In Minnesota it is judged, that decision takes away assumption of risk, where failure to observe statute is shown. McGinty v. Waterman, 113 Minn. 242, 101 N. W. 300. And this also seems quite pointedly involved in a Missouri case. Curtis v. McNair. 173 Mo. 270, 73 S. W. 167. In this case the employe was injured by molten metal flying from a furnace, from which the screen had been removed for repairs and not replaced. To the same effect seems decision in Haveland v. Hall Bros.' Maine Ry. & Shipbuilding Co., 41 Wash. 164, 82 Pac. 1090; Williams v. Ballard Lumber Co., 41 Wash. 338, 83 Pac. 323; Creech v. Wilmington Cotton Mills Co., 135 N. C. 680, 47 S. E. 671. So many other cases might be found.

But it seems to us, that courts have been less able to preserve a clear line of decision on these questions, because they stress too much the question of obvious danger, when, if that is to be greatly regarded, the statute is practically nullified. Of course, one should not be allowed to recover where he puts himself squarely within the reach of an unguarded machine or touches it like he would a guard around it, but there ought to be some middle ground, so as to give the statute vital effect in favor of those it plainly seeks to protect. To cut away the statute ought to constitute negligence *per se*. Baker v. Warring, (Ind.), 95 N. E. 257. That is to say it is negligence *per se* not to minimize the danger to the extent at least of observing the statute. Le Blanc v. United Irrigation & Rice Milling Co. (La.), 55 So. 761; Roundtree v. Kansas City Portland Cement Co., 156 Mo. App. 619, 137 S. W. 1012; Young v. Aloha Lumber Co. (Wash.), 116 Pac. 4. The talk about some evidence of negligence is confusing. The statute means something positive. C.

BOOK REVIEW.

THE RECORDS OF THE FEDERAL CONVENTION OF 1787.

The three volumes of this work (the first two being of records proper and the third an appendix of cognate matter) constitute a very remarkable publication edited by Mr. Max Farrand, Professor of History in Yale University. They present interesting sidelights on the framing of the Federal constitution. The notes by Yates, Madison, King, McHenry, Pierce, Paterson, Hamilton and Mason show the progress day by day of the great work for which the convention assembled. We wonder as we read how out of the situation, with questions of conflicting policy among the colonies, there could have issued such a sublime document.

There was not merely a question of framing the best document that human wit could devise as an intellectual achievement, but day after day the conviction is seen to grow, that there must be a document that would be accepted by the states.

Governor Randolph came with the Virginia plan and the New Jersey plan combatted it, but compromise, compromise was the dominant note throughout. So far, indeed, did the final draft of the proposed constitution fail to represent individual views that Doctor Franklin devised an ambiguous method for its being signed, which method, however, failed to satisfy all of the members and a very few failed to affix their signatures by way of attesting that the signing was in attestation of this being "done in convention by the unanimous consent of the states present." The great doctor appears all through the convention as the harmonizer and to him must be conceded the chief credit of saving it from disruption.

The appendix of "supplementary records of proceedings in convention" help greatly to portray the situation under which the delegates assembled, and why secrecy was enjoined as to its proceedings. Difficulties surrounded the members and they felt that unless they might confer freely with each other, there was little hope that the attempt to supersede the almost chaotic conditions that were existing would succeed.

The collection Prof. Farrand has made ought to be deemed invaluable. It helps us to realize how remarkably were reason and patriotism guiding our forefathers, and it is almost dramatic to learn how, after the convention began to open its sessions with invocation for divine guidance, the turbulence of those sessions began to abate.

Patriotism owes a debt of gratitude to Doctor Farrand for what he has done and all lovers of history, American or not, should cherish these volumes.

The volumes are bound in law buckram, and the paper excellent with gilt edges, and the typography clear and very readable. The work is published in this country by Yale University Press, 1911.

HUMOR OF THE LAW.

In examining prospective jurors for a murder trial in the general sessions court of New York, counsel for the accused said to one of the prospective jurymen: "This indictment accuses the defendant of killing the deceased with premeditation and deliberation. What do you understand by that?" "Who, me?" replied the talesman. "If you please," said the lawyer. "Why," answered the man, "them's the weapons he done the killing with."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Adverse Possession**—Oral Partition.—Where one took possession of land under an oral partition and claimed it as his own, and continuously occupied it for 25 years, he acquired title, notwithstanding the statute of frauds.—Blanton v. Howard, Ky., 146 S. W. 1089.

2. **Alteration of Instruments**—Bills and Notes.—The addition to a note by the payee of the words, "with interest six per cent," is a material alteration within Negotiable Instruments Law.—Columbia Distilling Co. v. Rech, 135 N. Y. Supp. 206.

3. **Attorney and Client**—Guardian ad Litem.—In determining the allowance to a guardian ad litem and corresponding attorney, the court must consider the character of the litigation, the value of the estate, the nature, necessity, duration, and extent of the services performed, and the result thereof.—Stucky v. Smith, Ky., 146 S. W. 1128.

4. **Bankruptcy**—Rent to Accrue.—Rent to accrue on a lease not expired at the time of the tenant's bankruptcy is not a provable debt.—Scott v. Demarest, 135 N. Y. Supp. 264.

5.——Appealable Order.—Rejection of charges against a receiver in bankruptcy for expenses incurred under receiver's orders or contracts for the preservation or care of the bankrupt's estate is within the discretion of the bankruptcy court, and no appeal lies therefrom.—O'Brien v. Ely, C. C. A., 195 Fed. 64.

6.——Insolvency.—Under Bankr. Act, July 1, 1898, § 1, subd. 15, whether a person was insolvent at the time of a mortgage and assignment of debts to his wife held to be determined by the market value of his property, rather than its value to him.—Ziegler v. Thayer, R. I., 83 Atl. 266.

7.——Insurance.—Though a bankrupt can do nothing in derogation of the estate, an agreement between a bankrupt insured and an insurer that the investigation of a loss should not constitute a waiver of the avoidance of the policy for failure to take an inventory will bind the bankrupt estate, where the agreement was signed by the insured in the presence of and with the advice of the receiver.—Day v. Home Ins. Co., Ala., 58 So. 549.

8.——Referee.—The court, on review of an order of referee in bankruptcy, will not pass on the evidence which the referee reports as sufficient to satisfy him of essential facts.—In re Soloway & Katz, U. S. D. C., 195 Fed. 103.

9.——Referee.—An order made without hearing by a referee in bankruptcy to compel a bankrupt to produce missing books of account was void.—In re Soloway & Katz, U. S. D. C., 195 Fed. 100.

10.——Referee.—A lawful order by a referee in bankruptcy to compel a bankrupt to produce missing books of account is a condition precedent to punishment for refusal to obey.—In re Soloway & Katz, U. S. D. C., 195 Fed. 100.

11.——Surety.—Where a ditch contractors' surety was vested with title to the contractors' plant under a chattel mortgage before bankruptcy, they were entitled to the property as against the trustee in bankruptcy.—Title Guaranty & Surety Co. v. Witmire, C. C. A., 195 Fed. 41.

12. **Banks and Banking**—Collateral.—A national bank receiving a note of a third person for the debt of its cashier who pledged collaterals attached to the note must be deemed to have contracted to keep the securities for the benefit of the maker, and its failure to do so was a breach of contract.—Skud v. Tillinghast, C. C. A., 195 Fed. 1.

13.——Provisional Credit.—A bank, though giving a customer a credit on the deposit of a check drawn by him on another bank against which he may draw, may, on the return of the check unpaid, charge it back to the customer.—Lyons v. Union Exch. Nat. Bank of New York, 135 N. Y. Supp. 121.

14. **Bills and Notes**—Actions on.—Suit on a note must be brought by the real party in interest.—Roller v. McKinney, N. C., 74 S. E. 966.

15.——Bearer.—Where a note is payable to a named payee or bearer, no indorsement or assignment is necessary to pass title.—Harper v. Peeples, Ga., 74 S. E. 1008.

16.——Bona Fide Purchaser.—Where a check was presented to an indorsee by a person claiming to be the agent of the maker, the fact that the alleged agent was willing to take a release of his own debt for a part of the amount of the check was sufficient to put the indorsee on inquiry as to the agent's authority.—Johnson v. Harrison, Ind., 97 N. E. 930.

17.——Bona Fide Purchaser.—To defeat the rights of a holder of commercial paper before maturity and for a valuable consideration, there must be proof of actual notice or knowledge of the defect in title of the payee or bad faith on the part of the holder; proof of facts sufficient to put a prudent man on inquiry being insufficient.—Citizens' Trust & Savings Bank v. Stackhouse, S. Car., 74 S. E. 977.

18. **Brokers**—Commissions.—An owner employing a broker to negotiate a sale of real estate may not escape paying the commission where he accepts the purchaser procured by the

broker, and conveys the premises to him.—Van Varick v. Suburban Inv. Co., 135 N. Y. Supp. 299.

19. **Carriers of Goods**—Discrimination.—That carriers transport coal of other shippers from practically the same territory at the same rates to the same territory and at the same time refuse to carry petitioners' coal shows unjust discrimination.—United States v. Louisville R. R. Co., U. S. Com. Ct., 195 Fed. 88.

20. **Carriers of Passengers**—Commerce.—The fact that a pass is issued under an established contract, valid when made does not exempt the parties from the operation of Interstate Commerce Act.—Gill v. Erie R. Co., 135 N. Y. Supp. 399.

21.——Contract for Transportation.—As between the passenger and the carrier, a ticket is a mere memorandum of the contract of transportation, the real terms of which are entered into before the delivery of the ticket; but, as between the passenger and the conductor, the ticket is considered as evidence of the passenger's rights.—Illinois Cent. R. Co. v. Fleming, Ky., 146 S. W. 1110.

22.——Anticipating Demands.—It is the duty of a carrier to provide reasonably adequate facilities to meet the present and prospective demands for the safety, comfort, and convenience of the public.—Louisville & N. R. Co. v. Railroad Com'rs, Fla., 58 So. 543.

23.——Stopping at Stations.—A street railroad company was liable for failure to stop and take up a passenger, if, in the exercise of due care, it might have seen the passenger or if it was grossly negligent in failing to see him.—Godfrey v. Meridian Ry. & Light Co., Miss., 58 So. 534.

24. **Chattel Mortgages**—Failure to Record.—A purchaser from a bona fide purchaser without notice of an unrecorded chattel mortgage unaccompanied by any change of possession acquires title as against the mortgagee.—Hawkins v. Western Natl. Bank of Hereford, Tex., 146 S. W. 1191.

25. **Commerce**—Contributory Negligence.—Until Congress acted there was no repugnancy to the commerce clause of the federal Constitution of Comp. St. Neb. 1911, c. 21, § 4, providing that contributory negligence of a railroad employee while engaged in interstate commerce did not bar recovery, where his negligence was slight and that of the company was gross.—Missouri Pac. R. Co. v. Castle, 32 Sup. Ct. Rep. 606.

26.——Garnishment.—To charge a railroad company as trustee of goods delivered to it as a carrier for interstate shipment would not be an unlawful interference with interstate commerce.—Rosenbush v. Bernheimer, Mass., 97 N. E. 984.

27.——Jurisdiction.—Commerce Court has no jurisdiction to consider a question of car distribution in advance of action by the Interstate Commerce Commission, on complaint of a shipper who claims that connecting carriers discriminate against him in refusing freight.—United States v. Louisville & N. R. Co., U. S. Com. Ct., 195 Fed. 88.

28. **Compositions With Creditors**—Parol.—A composition agreement need not be in writing.—Atlas Engine Works v. First Nat. Bank, Ind., 97 N. E. 952.

29. **Constitutional Law**—Due Process of Law.—A rule of law of a state court that a special appearance to quash service of process on a nonresident is converted into a general appearance where an appeal is taken by him from an adverse judgment, on trial on the merits, held not to deprive him of due process of law.—Chinn v. Foster-Milburn Co., U. S. D. C., 195 Fed. 158.

30.——Obligation of Contracts.—A colonial grant to the trustees of a town ratified by legislative action is a contract, the obligation of which the state cannot impair.—People ex rel. Squires v. Hand, 135 N. Y. Supp. 192.

31.——Telegraph and Telephones.—Assent of municipality given under charter of telephone company perfects the company's franchise, which cannot be repealed or forfeited by a municipal ordinance.—City of Louisville v. Cumberland Telephone & Telegraph Co., 32 Sup. Ct. Rep. 572.

32. **Contracts**—Construction.—As a general rule, the court is the judge of the meaning of a written instrument, except where it is not to be understood without reference to extrinsic facts.—Standiford v. Kloman, Pa., 83 Atl. 311.

33.——Law of Place.—A contract to be performed in Minnesota, concerning property to be transferred there, is governed by the laws of that state though made in Illinois.—Title Guaranty & Surety Co. v. Witmire, 195 Fed. 41.

34. **Corporations**—De Facto.—The question whether an action is maintainable by a corporation depends on the de facto existence of the corporation at the time of the bringing of the suit, as its right to exist can only be questioned by the state.—Belvidere Water Co. v. Town of Belvidere, N. J., 83 Atl. 241.

35.——Discretion of Directors.—Powers of directors of corporation, in good faith deferring the distribution of dividends to stockholders, held final and not subject to judicial revision.—Blanchard v. Prudential Ins. Co. of America, N. J., 83 Atl. 220.

36.——Stockholders.—A court of equity in this state held to have no jurisdiction over a bill by a stockholder of a foreign corporation against officers and directors for an accounting, nor to review a judgment against the company in the state of its domicile.—Kelly v. Thomas, Pa., 83 Atl. 307.

37. **Covenants**—Enforcement.—A restrictive covenant in a conveyance of a part of a tract of land, beneficial to the remainder, will be enforced in favor of the covenantee, who owns the remaining part, against the covenantor's grantee, with notice of the covenant.—Sanford v. Keer, N. J., 83 Atl. 225.

38. **Criminal Law**—Merger.—The offense of carrying an unlawful weapon is not merged in an indictment for maiming with the weapon alleged to have been so carried.—State v. Angus, W. Va., 74 S. E. 998.

39. **Criminal Trial**—Verdict.—One accused of crime is entitled to the concurrence of all the jurors on one definite charge, and hence an instruction permitting a conviction if part of the jury thought him guilty of one offense and part another was improper.—State v. Jackson, Mo., 146 S. W. 1166.

40. **Curtesy**—Defined.—Curtesy is the estate to which by common law a man is entitled on the death of his wife in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they had lawful issue born alive, which might have been capable of inheriting the estate, and it attaches to the wife's equitable as well as her legal estate of inheritance.—Armstrong v. Wood, U. S. C. C., 195 Fed. 137.

41. **Customs and Usages**—Contracts.—Usage enters into every contract and may be shown for the purpose not only of elucidating the contract, but also of completing it.—Southern Bitulithic Co. v. Algiers Ry. & Lighting Co., La., 58 So. 588.

42. **Damages**—Interest.—Damages in a personal injury case are assessed as of the date of the trial, and there can be no general compensation for delay, and compensation for such delay can never be at a higher rate than 6 per cent.—McGonnell v. Pittsburgh Rys. Co., Pa., 83 Atl. 282.

43.——Punitive.—Punitive damages are recovable, not only for willful and intentional wrong, but for such gross and reckless negligence as is equivalent to willful wrong.—Godfrey v. Meridian Ry. & Light Co., Miss., 58 So. 534.

44.——Punitive.—For the purpose of determining whether exemplary damages are properly allowed, the word "malice" means that the act done must have been done without right or justifiable cause.—Smith v. Morganton Ice Co., N. Car., 74 S. E. 961.

45. **Death**—Presumption.—In an action for negligent death, decedent is presumed to have used reasonable care for his own safety, in the absence of evidence to the contrary.—Rothe v. Pennsylvania Co., C. C. A., 195 Fed. 21.

46. **Deeds**—Condition Precedent.—A condition in a deed, though not favored, will be enforced when the language creating it is plain and explicit.—Southwick v. New York Christian Missionary Society, 135 N. Y. Supp. 392.

47. **Dedication**—Acceptance.—Land dedicated for a public highway does not become a public thoroughfare without acceptance by the public, indicated by formal action by the proper representatives, or by public user.—Schmidt v. Spaeth, N. J., 83 Atl. 242.

48.——Platted Streets.—The owner of any lot who has purchased with knowledge of a plan is not entitled to obstruct or deny public right to use any of the streets or alleys shown on the plan; the easement being appurtenant to every lot.—O'Donnell v. City of Pittsburgh, Pa., 83 Atl. 314.

49. **Divorce**—Estoppel.—Bad conduct by husband other than cruelty and infidelity cannot be set up as a bar to his suit for divorce for adultery.—Seibert v. Seibert, N. J., 83 Atl. 230.

50.——Interlocutory Decree.—An interlocutory decree of divorce in favor of a husband may not provide that he shall not pay for the support of the wife pursuant to a judgment in an action for separation.—Burton v. Burton, 135 N. Y. Supp. 248.

51. **Dower**—Tenancy in Common.—A widow owning an unassigned dower interest in land of her husband is a tenant in common to the extent of such interest with the husband's heirs, their grantees, and other owners of the property, and is entitled to possession and a proper share of the income.—Humphrey v. Gerard, Conn., 83 Atl. 210.

52. **Electricity**—Negligence.—A generating company that delivers electricity to a distributing company is not liable, if the lines of the company over which the current is carried to the consumer were not in a safe condition.—Perry v. Ohio Valley Electric Ry. Co., W. Va., 74 S. E. 993.

53. **Eminent Domain**—Additional Servitude.—Where an abutting owner has title to the fee of the highway, an improper use of the highway is an additional servitude on his property constituting a trespass for which he may recover damages.—Cadwell v. Connecticut Co., Conn., 83 Atl. 215.

54.——Restrictive Covenants.—That property is subject to covenants restricting its use to residential purposes does not preclude the construction of a railroad thereover, pursuant to statutory authority.—In re New York, W. & B. Ry. Co., 135 N. Y. Supp. 234.

55. **Equity**—Injunction.—Where a club sought an injunction to restrain the police from raiding its premises, held that it should be refused; the sole purpose of the club being to violate the liquor law, and so not coming into court with clean hands.—Modern Horse Shoe Club v. Stewart, Mo., 146 S. W. 1157.

56. **Evidence**—Accrediting Witness.—A party on whom the burden of proof rests cannot call his adversary as a witness to an alleged fact, and, after proving by him that the fact does not exist, call on the jury to discredit him, and from this alone demand an affirmative finding of the existence of the fact.—Voorhees v. Unger, 135 N. Y. Supp. 113.

57. **Execution**—Caveat Emptor.—A purchaser of land at an execution sale acquires only the title and interest of the execution debtor at the time the judgment was docketed, and hence where, prior to the docketing of a judgment, the execution debtor had entered into an oral contract of sale, followed by possession and payment of the purchase price in full, the purchaser at the execution sale acquired no title.—McNamara v. McNamara, 135 N. Y. Supp. 215.

58. **Executors and Administrators**—Employing Counsel.—It being the duty of the executors to sustain the will, they have authority to employ counsel for that purpose and to make an agreement with them as to their fees, and where a verdict on an issue as to the validity of the will was such that it could not be accurately determined what part of the will was valid, it was proper for them to direct the attorneys to appeal.—Baldwin's Ex'r. v. Barber's Ex'rs., Ky., 146 S. W. 1124.

59. **False Imprisonment**—Justice of the Peace.—Where a magistrate having jurisdiction to hold an examining trial attempted to try one accused of a misdemeanor, and, though without jurisdiction, sentenced him to imprisonment, the magistrate is not liable in a civil action for false imprisonment where he did not act maliciously.—Starrett v. Connolly, 135 N. Y. Supp. 325.

60. **Fraudulent Conveyances**—Badge of Fraud.—While the continued use of property transferred by an insolvent debtor is a badge of fraud, it is not necessarily conclusive.—Voorhees v. Unger, 135 N. Y. Supp. 113.

61. **Frauds, Statute of**—Oral Acceptance.—A written offer to sell an interest in land, which was orally accepted before any revocation, became a binding contract.—Fox v. Hawkins, 135 N. Y. Supp. 245.

62. **Highways**—Overloaded Wagon.—A count of a declaration which alleged that the defendant, while engaged in hauling bales of paper stock to its mill, negligently loaded the same upon its wagon, and in consequence of the negligence the bales fell therefrom upon the public highway, and, lying there, frightened plaintiff's mules, causing them to run away to his injury, sufficiently charged the negligence of the defendant.—Cecil Paper Co. v. Nesbitt, Md., 83 Atl. 254.

63. **Homestead**—Purchase Money.—If homestead property is sold for payment of the purchase price, or other debt to which the exemption does not apply, the privileged creditor will be paid fully; and the homesteader takes the surplus up to $2,000, provided he has not parted with his right so to do.—In re Penn, La., 58 So. 554.

64. **Infants**—Ratification.—One who, after attaining his majority, accepts a part of the consideration for a conveyance made while an infant, thereby ratifies the conveyance.—Clark v. Kidd, Ky., 146 S. W. 1097.

65. **Insurance**—Application for.—An application for a life policy, not incorporated in the policy or shown by it in any way, is not a part of the policy.—Breeden v. Western & Southern Life Ins. Co., Ky., 146 S. W. 1104.

66.——Forfeiture.—A covenant in a fire policy for the avoidance of the policy upon failure of insured to take an inventory within 30 days and to take a yearly inventory is reasonable.—Day v. Home Ins. Co., Ala., 58 So. 549.

67.——Premium Notes.—Where insurance policies were delivered and receipts given by the general agent of the insurer for the premiums, the policies became binding contracts, though the insured gave only a note for the premiums.—McGee v. Felter, 135 N. Y. Supp. 267.

68.——Regulation.—The Legislature has power to regulate the business of life insurance in this state, whether carried on by a domestic or foreign company, an individual, or an association.—People ex rel. Moore v. Holmes, 135 N. Y. Supp. 467.

69. **Judgment**—Federal Court.—A federal court ordering on motion for judgment that the evidence shall be certified and filed held authorized at a subsequent term to supply the omission of the clerk to mark the evidence filed, and the judge to certify that it is correct.—Cornette v. Baltimore & O. R. Co., C. C. A., 195 Fed. 59.

70. **Judicial Sales**—Voidable.—A judicial sale is not void, but voidable merely, because of the master commissioner, appointed to make the sale, being the real purchaser, either directly or indirectly.—Sears v. Collie, Ky., 146 S. W. 1117.

71. **Limitation of Actions**—Starting Point.—The cause of action of a surety against his principal for reimbursement of a payment made by the surety arises where such payment was made, although the principal was not then a resident of the state.—Runkle v. Pullin, Ind., 97 N. E. 956.

72. **Master and Servant**—Place of Accident.—Where the accident in which an employee was injured, occurred in Tennessee, the rights and liabilities of the parties are to be determined by the laws of that state.—Louisville & N. R. Co. v. Moran, Ky., 146 S. W. 1131.

73.——Contributory Negligence.—Police power of a state justifies a modification of the doctrine of contributory negligence by providing that contributory negligence shall not bar recovery where employee's negligence was slight and that of the employer gross in comparison.—Missouri Pac. R. Co. v. Castle, 32 Sup. Ct. Rep. 606.

74.——Employers' Liability Act.—Existing as well as future contracts intended by carriers to relieve from liability fall within the condemnation in Employer's Liability Act.—Philadelphia, B. & W. R. Co. v. Schubert, 32 Sup. Ct. Rep. 589.

75.——Other Employment.—An employer discharging an employee before the expiration of his term of employment held to have the burden of showing that the employee could or did obtain other employment, and hence where he offered no evidence he was not harmed by a finding that the employee was unable to obtain other employment—Grant v. New Departure Mfg. Co., Conn., 83 Atl. 212.

76.——Safe-guarding Machinery.—In employee's action for injuries, which the evidence indicated could have been prevented by a guard on the machine he was operating, which guards were in general use on similar machines, defendant's negligence should have been submitted to the jury.—Parker v. Vanderbilt, N. Car., 74 S. E. 964.

77.——Safe Working Place.—A master who exercised ordinary prudence to cause the plans and specifications of his plant to be prepared and executed by competent engineers and contractors was not liable for death of an employee, though caused from a defect in the plant.—Rath v. Transit Development Co., 135 N. Y. Supp. 229.

78.——Wrongful Discharge.—A declaration, alleging that plaintiff was hired by defendant as a clerk and salesman, and was wrongfully discharged, as a result of which he sustained specified damages "on account of the said contract," claims damages for breach of the contract, and not a recovery for breach of the contract, and not a recovery for constructive services.—Derosia v. Ferland, Vt., 83 Atl. 271.

79. **Mortgages**—Injunction.—A demand for unliquidated damages for breach of covenant of warranty is not ground to enjoin sale of land for debt under a deed of trust to secure the price.—Shrader v. Gardner, W. Va., 74 S. E. 990.

80. **Municipal Corporations**—Legislative Power.—The Legislature may declare what is a municipal purpose of taxation, and a duly enacted statute designating a municipal purpose is subject only to the provisions of organic law.—City of Tampa v. Prince, Fla., 58 So. 542.

81.——Nuisance.—An ordinance, declaring the use of property to be a nuisance, does not make it so unless it is in fact so or is embraced within the common law or statutory idea of a nuisance, and no authority to abate is derived from an ordinance declaring it a nuisance.—City of Shreveport v. Liederkranz Society, La., 58 So. 578.

82. **Navigable Waters**—Drawbridge.—Under the rules prescribed by the federal government requiring drawbridge tenders to open the draw on signal from any steamboat, a drawbridge tender would not be negligent for opening the draw in answer to a steamboat signal, though he knew that the boat could pass under without opening it.—Louisville & N. R. Co. v. Moran, Ky., 146 S. W. 1131.

83. **Negligence**—Proximate Cause.—There may be two or more proximate causes of an accident, if each can be said to have been an efficient one, without which the injury could not have been sustained.—Pulis v. Stewart, 135 N. Y. Supp. 155.

84 **Notaries**—Negligence.—The bond of a notary public is one of indemnity only, and one recovering damages, based on the notary's negligence, can only recover the amount of the actual loss.—State ex rel. Savings Trust Co. v. Hallen, Mo., 146 S. W. 1171.

85. **Parent and Child**—Imputable Negligence.—A parent is not negligent in permitting his four year old child to be on the sidewalk adjoining his premises.—Palermo v. Orleans Ice Mfg. Co., La., 58 So. 589.

86. **Partition**—Setting Aside Sale.—In partition sale where purchaser is induced to bid on the belief that representations of auctioneer will be ratified by the trustee conducting the sale, and they are not, the sale will be set aside, but at the cost of the purchaser, where he filed no objections until three months after the sale.—In re Hammill's Estate, Pa., 83 Atl. 393.

87. **Partnership**—Bills and Notes.—A partner has no right to sue as an individual on a note purchased by the partnership.—Roller v. McKinney, N. Car., 74 S. E. 966.

88.——Dissolution.—Where a partner conveys his interest in the firm property to his copartner, thereby dissolving the firm, without in any manner reserving the quasi lien of the firm creditors, the quasi lien is lost.—Hawkins v. Western Nat. Bank of Hereford, Tex., 146 S. W. 1191.

89. **Pledges**—Conversion.—A pledgee who converts the pledge thereby in effect discharges the debt, and the same result follows where the pledgee through his fault fails to preserve the pledge.—Skud v. Tillinghast, C. C. A., 195 Fed. 1.

90. **Principal and Agent**—Scope of Agency.—In the absence of special authority to bind his principal, a commercial traveler can merely solicit and transmit the order; the contract of sale not becoming complete until it is accepted by the principal, the purchaser having the right to revoke the order until acceptance.—Ryan & Miller v. American Steel & Wire Co., Ky., 146 S. W. 1099.

91. **Railroads**—Kicking Cars.—Where the employees of a railroad company "kicked" a box car over a wholly unprotected crossing of a town by means of a "running switch," with no one on the car who was able to see persons on the crossing, and no one at the crossing to warn pedestrians, and at the same time ran its engine on a different track and in a different direction they were guilty of gross negligence as a matter of law.—Cincinnati, N. O. & T. P. Ry. Co v. Ackerman, Ky., 146 S. W. 1113.

92. **Remainders**—Termination.—Where land was conveyed to the grantors' son with a contingent remainder in the grantors' children, including the son, but the son's life estate was terminated by a conveyance by him and the grantor to a third person, such conveyance also terminated the remainder.—Crumpton v. Demunbrun, Ky., 146 S. W. 1100.

93. **Sales**—Damages on Rescission.—The purchaser of an engine rejected because worthless for the purpose for which intended is entitled to recover all the damages sustained by him from the seller's breach of contract, including freight paid and a reasonable sum for storing and caring for it until directed by the seller not to do so.—Ash v. International Harvester Co. of America, Miss., 58 So. 529.

94. **Trusts**—Resulting Trust.—That there may be a resulting trust in favor of one from the acquisition of title to property by others, part of the consideration by which they secured title must have come from him.—Lander v. Persky, Conn., 83 Atl. 209.

95.——Wills.—A will, giving property to husband of testatrix "to use as he thinks best for the maintenance of our children," gave him power to sell and convey in fee simple to obtain means for the children's maintenance.—Ripley v. Armstrong, N. Car., 74 S. E. 961.

96. **Wills**—Construction.—Where testator gave all his personalty and real estate to his wife with desire that certain money legacies should be paid "out of the estate," a real estate devise to the wife was not charged with the money legacies.—In re Wallace's Estate, Pa., 83 Atl. 280.

97.——Devisees.—Where an estate is given generally with power of disposition, the devisee or legatee takes the property absolutely, and not merely a power, but, where the property is expressly for life with a power of disposition annexed, the first taker has but a life estate with a superadded power.—Snyder v. Snyder, Md., 83 Atl. 246.